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In The

# Supreme Court of the United States

ROBIN AMARO BRUNGART,

*Petitioner,*

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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86 pp

## QUESTIONS PRESENTED

1. UNDER THE FAMILY AND MEDICAL LEAVE ACT ("FMLA"), DOES THE TERMINATION OF AN EMPLOYEE THE DAY BEFORE SHE IS SCHEDULED TO TAKE STATUTORY LEAVE CONSTITUTE PRIMA FACIE EVIDENCE OF RETALIATION UNDER THE STATUTE?

2. UNDER THE FMLA, DOES AN EMPLOYER'S FAILURE TO FOLLOW THE NOTICE REQUIREMENTS UNDER 29 C.F.R. § 825.110(d) CONSTITUTE A VIOLATION OF THE ACT GIVING RISE TO A PRIVATE CAUSE OF ACTION?

3. WHAT ARE THE LEGAL CONSEQUENCES OF AN EMPLOYER'S FAILURE TO PROVIDE THE NOTICE TO EMPLOYEES REQUIRED BY THE FMLA?

4. CAN AN EMPLOYER CURE THE FAILURE TO GIVE THE *REQUIRED* NOTICE OF APPROVAL OR DISAPPROVAL OF MEDICAL LEAVE, AS REQUIRED BY 29 C.F.R. § 825.110(d) BY SUBSEQUENTLY ESTABLISHING THE EMPLOYEE WAS NOT *ELIGIBLE* FOR FMLA LEAVE?

## CERTIFICATE OF INTERESTED PARTIES

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## PETITION FOR WRIT OF CERTIORARI

Robin Amaro Brungart ("Brungart") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 24, 2000, in order to address issues of first impression on an important federal question for this Court.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit which gives rise to this petition is published at 231 F.3d 791 and is reprinted in Appendix A hereto ("App. A") at page App 1. By Order filed January 3, 2001, the Eleventh Circuit denied the petition for rehearing. App. E, App. 42.

## JURISDICTION

The petitioner filed her complaint against the respondent, BellSouth Telecommunications, Inc. ("BST"), on October 8, 1998. The trial court entered an order granting BST's motion for summary judgment on September 15, 1999. The petitioner filed a motion to alter, amend, and vacate with the trial court on September 29, 1999. The United States District Court for the Northern District of Alabama denied this motion on October 22, 1999. BST filed its notice of appeal to the United States Court of Appeals for the Eleventh Circuit on October 29, 1999.

On October 24, 2000, the Eleventh Circuit affirmed the district court's ruling. The petitioner filed a petition for rehearing on November 13, 2000. The Eleventh Circuit denied this petition on January 3, 2001.

This Court has jurisdiction to review the decision of the Court of Appeals for the Eleventh Circuit under 28 U.S.C. § 1254.

## STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Section 2601 Title 29 of the United States Code provides:

> (a) Findings. Congress finds that –
>
> (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
>
> (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
>
> (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
>
> (4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;
>
> (5) due to the nature of the roles of men and women in our society, the primary responsibility

for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes. It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment [USCS, Constitution, Amendment 14, §§ 1] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Section 2611 of Title 29 of the United States Code provides:

As used in this title [29 USCS § 2611 *et seq.*]:

(1) Commerce. The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(2) Eligible employee.

(A) In general. The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102 [29 USCS § 2612]; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions. The term "eligible employee" does not include –

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code [5 USCS § 6381 *et seq.*] (as added by Title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer

employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination. For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) Employ; employee; State. The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (c), (e), and (g)).

(4) Employer.

(A) In general. The term "employer" –

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency. For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5). Employment benefits. The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(6) Health care provider. The term "health care provider" means –

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent. The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person. The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(9) Reduced leave schedule. The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary. The term "Secretary" means the Secretary of Labor.

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter. The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is –

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse. The term "spouse" means a husband or wife, as the case may be.

Section 2612 of Title 29 of the United States Code provides:

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave

during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on a reduced leave schedule.

(1) In general. Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5) [*29 USCS §§ 2613*(b)(5)], leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a

reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position. If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title [29 USCS § 2611 *et seq.*] by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title [29 USCS § 2611 *et seq.*] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 USCS § 2611 *et seq.*] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave.

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by the same employer. In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

Section 2615 of Title 29 of the United States Code provides:

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS § 2611 *et seq.*].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS § 2611 *et seq.*].

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [29 USCS § 2611 *et seq.*];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 USCS § 2611 *et seq.*]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [29 USCS § 2611 *et seq.*].

Title 29 of the Code of Federal Regulations, § 825.110 provides:

(a) An "eligible employee" is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (See §§ 825.105(a) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (See 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be

used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also §§ 825.500(f). For this purpose, full-time teachers (see §§ 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may

not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of

> the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

Title 29 of the Code of Federal Regulations, § 825.301 provides:

> (a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.
>
> (2) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights

and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see §§ 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see §§ 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see §§ 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see §§ 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see §§ 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see §§ 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ §§ 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see §§ 825.213).

(2) The specific notice may include other information – e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for

leave is given by the employee – within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-months period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not

required, at least oral notice shall be provided. (See §§ 825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

## STATEMENT OF THE CASE

### Factual History of Claims[1]

The petitioner, Robin Amaro Brungart, began her employment with BellSouth Telecommunications, Inc. ("BST") on February 11, 1991.[2] In December, 1994, Mrs. Brungart went on a leave of absence pending transfer.[3] BST gave Mrs. Brungart a transfer to the Birmingham

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[1] The record references are to the record on appeal, as presented to the Eleventh Circuit Court of Appeals.

[2] *See Record 18, Plaintiff's Evidentiary Materials, Doc 18, Plaintiff's Exhibit #1.*

[3] *See Record 18, Plaintiff's Evidentiary Materials, Doc 18, Plaintiff's Exhibit #2, Deposition Testimony of Robin Brungart,* p. 42.

location for BST, and she began work at that location on September 23, 1996.[4]

On December 2, 1996, Mrs. Brungart's mother went into the hospital for emergency heart surgery.[5] On the day that her mother was admitted to the hospital, Mrs. Brungart expressed to her supervisors that she wished to apply for leave under the Family and Medical Leave Act ("FMLA") because she would be off work for more than three (3) days for her mother's surgery.[6]

Mrs. Brungart's supervisors told her that they did not know how to handle FMLA leave requests.[7] Mrs. Brungart nevertheless filled out the paperwork necessary for FMLA leave and submitted it that day.[8]

Peggy Thompson, one of Mrs. Brungart's supervisors, called Mrs. Brungart at the hospital. Mrs. Brungart informed Ms. Thompson that she would be off work for the next week to ten (10) days due to her mother's condition.[9] Ms. Thompson told Mrs. Brungart to keep in touch every few days to let the office know how her mother was doing.[10]

Pursuant to her supervisor's instructions, Mrs. Brungart contacted BST every few days to provide an

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[4] *See id.*, p. 52.

[5] *See id.*, pp. 63-68.

[6] *See id.*, pp. 63-68, p. 327.

[7] *See id.*, p. 327.

[8] *See id.*, pp. 63-68.

[9] *See id.*, p. 329.

[10] *See id.*, pp. 64, 329.

update on her mother's condition.[11] On December 10, 1996, at 7:30 p.m., Ms. Thompson called Mrs. Brungart and informed her that she had been listed as "no report" because she had not called in every day.[12] Mrs. Brungart responded that Ms. Thompson had not told her to call in every day.[13]

The next day, Mrs. Brungart called Ms. Thompson to let her know that she was going to be out that day to take care of her mother.[14] Once again, she was not given notice of her rights, responsibilities, or eligibility under the FMLA. BST, however, disciplined Mrs. Brungart with a "write up" for not calling before her shift started.[15]

When Mrs. Brungart returned to work, BST presented her with a written reprimand for her absence.[16] Mrs. Brungart was reprimanded for her absence even though there had been no determination as to whether the FMLA covered her leave.

Mrs. Brungart was never given notice of her FMLA rights. She informed BST of her mother's medical condition, and her need for leave, on December 2, 1996. BST did not mail Mrs. Brungart notice that her request for FMLA leave had been denied until January 16, 1997,

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[11] *See id.*, p. 64.

[12] *See id.*, p. 64.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See Record 18, Plaintiff's Evidentiary Materials, Doc.* 18 - *Plaintiff's Exhibit #8, Personnel Record Current Entry Sheet, Form B.*

almost a month after she had returned to work from her mother's surgery.[17]

BST never gave Mrs. Brungart notice of her rights under the Family and Medical Leave Act for the requested medical leave covered by the statute.[18] When Mrs. Brungart applied for emergency leave under the FMLA, she was not given notice within 48 hours as to whether that leave had been approved.[19] Mrs. Brungart was not notified that her application for FMLA leave had been disallowed until almost a month after she had returned to work from her leave.[20]

Mrs. Brungart was terminated by BST on July 9, 1997.[21] Prior to her termination, BST granted Mrs. Brungart's request to take three (3) weeks of leave from work under the FMLA.[22] BST terminated Mrs. Brungart the day before she was to take this leave.

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[17] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Plaintiff's Exhibit #7, Letter to Robin Brungart from FMLA Administrator; Plaintiff's Exhibit #4, Deposition Testimony of Priss Pittman*, p. 38.

[18] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Plaintiff's Exhibit #4, Deposition Testimony of Priss Pittman*, p. 48; *Plaintiff's Exhibit #3, Deposition Testimony of Calvin Nelson*, p. 14.

[19] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Plaintiff's Exhibit #4, Deposition Testimony of Priss Pittman*, p. 40.

[20] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Plaintiff's Exhibit #7, Letter to Brungart from FMLA Administrator.*

[21] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Exhibit #3, Deposition of Calvin Nelson;* p. 13.

[22] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Exhibit #1, Defendant's Interrogatory Answers.*

*Procedural History*

Mrs. Brungart filed her complaint against BST on October 8, 1998, arguing that the defendant had violated her rights under the FMLA by failing to give her timely notice of her eligibility under the FMLA with regards to the leave she sought for her mother's surgery, interfered with her rights under the FMLA by failing to give her notice of her rights and responsibilities under the Act when she sought protected leave, and retaliated against her for attempting to take leave under the FMLA.[23]

The trial court entered an order granting BST's motion for summary judgment on September 15, 1999. The court reasoned that temporal proximity between Mrs. Brungart's FMLA leave and her termination alone were not sufficient to establish a prima facie case of retaliation. To demonstrate a causal connection, the trial court reasoned, Mrs. Brungart would have to demonstrate actual knowledge of her leave on the part of the decisionmaker. The court also held that Mrs. Brungart was not wrongfully denied leave in violation of 29 C.F.R. § 825.110(d) because that regulation ran contrary to the statutory language of the FMLA. Finally, the trial court concluded that Mrs. Brungart had not demonstrated that a cause of action existed for violation of the notice provisions of the FMLA because the employer's failure to provide notice did not constitute an interference with her rights under the FMLA because she was not eligible for leave under the Act.

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[23] Mrs. Brungart also alleged a claim under the LMRA which she did not pursue on appeal.

Mrs. Brungart filed her notice of appeal to the United States Court of Appeals for the Eleventh Circuit on October 29, 1999, which had jurisdiction pursuant to 28 U.S.C. § 1291. On October 24, 2000, the Eleventh Circuit affirmed the district court's ruling. The Eleventh Circuit agreed with the district court that Mrs. Brungart's wrongful denial of leave claim was founded on a regulation which ran contrary to the statutory language of the FMLA. The Eleventh Circuit affirmed the trial court's determination that Mrs. Brungart did not establish a prima facie case of retaliation under the FMLA by reasoning that temporal proximity alone is insufficient to create a genuine issue of material fact as to a causal connection where there is testimony that the decisionmaker did not have knowledge that the employee engaged in protected conduct. The Eleventh Circuit did not speak as to whether a cause of action existed with regards to an employer's failure to provide adequate notice under the FMLA. The Eleventh Circuit denied Mrs. Brungart's petition for rehearing on January 3, 2001.

## REASONS FOR GRANTING THE WRIT

### I. THE ISSUES ON APPEAL ARE ISSUES OF FIRST IMPRESSION FOR THE COURT CONCERNING IMPORTANT FEDERAL QUESTIONS.

Rule 10(c) of the Rules of the Supreme Court of the United States provides that a writ of certiorari may be appropriate when a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . . " This

Court has not addressed the above questions presented with respect to the FMLA.

**A. Under the Family and Medical Leave Act ("FMLA"), the termination of an employee on the day before she is scheduled to take statutory leave is prima facie evidence of retaliation under the statute.**

An employer cannot terminate an employee for taking FMLA leave. *See Ritchie v. Grand Casinos of Mississippi, Inc.*, No. 1:98-CV-325RG, 1999 U.S. Dist. LEXIS 7345, at *3 (S.D. Miss. Feb. 17, 1999) (citing 29 U.S.C. § 2654). To prove a prima facie case that an employer discharged an employee in retaliation for taking FMLA leave, a plaintiff must establish the following three (3) elements: (1) the plaintiff engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. *See Trujillo-Cummings v. Public Service Co. of New Mexico*, No. 97-2337, 1999 U.S. App. LEXIS 5745, at *6 (10th Cir. March 29, 1999).

For purposes of proving retaliation in violation of the FMLA, the temporal proximity of the plaintiff's leave and her termination demonstrates a causal connection. *See Trujillo-Cummings* 1999 U.S. App. LEXIS 5745, at *6 (observing that temporal proximity may justify an inference of retaliatory motive); *McClendon v. Indiana Sugars, Inc.* 108 F.3d 789, 796 (7th Cir. 1997) ("We agree that . . . such a closely related sequence of events is sufficient to present a prima facie case.").

The Eleventh Circuit's holding establishes a dangerous precedent of encouraging decision makers to deny knowledge of their employee's FMLA leave. The temporal proximity between leave which has been approved by the employer and an adverse action taken by the employer should suggest knowledge on the part of the employer and suffice to establish a causal connection for a retaliation claim under the FMLA. This Court has not directly addressed whether the temporal proximity between the FMLA leave of an employee and the adverse action suffered by the employee is sufficient to demonstrate a causal connection for purposes of establishing a prima facie case of retaliation.

### B. Under the FMLA, BST's failure to follow the prescriptions of 29 C.F.R. § 825.110(d) constitutes a violation of the act.

An employer's failure to give an employee notice of the employee's eligibility as required by the FMLA regulations estops the employer from denying the employee's eligibility for FMLA leave, **even if the employee is in fact ineligible under the statute.** *See Miller v. Defiance Metal Prods., Inc.*, 989 F. Supp. 945, 948 (N.D. Ohio 1997) (citing 29 C.F.R. § 825.110(d)). BST did not inform Mrs. Brungart as to her eligibility under the FMLA until almost a month after she had returned to work from her mother's surgery.[24] As a result, she was disciplined for

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[24] *See Record 18, Plaintiff's Evidentiary Materials, Doc. 18 - Plaintiff's Exhibit #7, Letter to Robin Brungart from FMLA Administrator; Plaintiff's Exhibit #4, Deposition Testimony of Priss Pittman*, p. 38.

leave which she believed to be protected under the FMLA.

When reviewing a federal regulation, the relevant questions are (1) whether Congress has directly spoken to the question at issue, and if not, (2) whether the regulations interpret the statute based on a permissible construction thereof. *See Chevron U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 841-44 (1984).

This regulation speaks to an issue not squarely addressed by the statutory language of the FMLA, the notice obligations of an employer. Moreover, the regulation is consistent with the stated purpose of the FMLA, to "balance the demands of the workplace with the needs of the family." 29 U.S.C. § 2601(b)(1). This purpose envisions a dialogue between employers and employees ***where both are informed*** of their rights and responsibilities under the statute at the timē leave is requested so that both may plan and conduct their activities to meet personal and professional needs.

Stated differently, if an employee is not told about his rights and responsibilities ***at the time leave is requested***, neither the employee nor the employer can "plan" or "conduct" their personal activities, as contemplated by the Act. This intended purpose applies to all employees, not just employees who are entitled to leave under the statute. That is why the statute has specific notice provisions. Employers and employees are bound by these provisions in order to effectuate this purpose. The Eleventh Circuit's holding on this issue effectively moots the stated purpose of the FMLA. The validity of the regulation at

issue is an important federal question to which this Court has not yet spoken.

### C. BST's failure to provide Mrs. Brungart with notice of her rights and responsibilities under the FMLA constitutes an actionable violation of the act.

An employee has a right to receive notice of his rights under the Family and Medical Leave Act *upon requesting leave* which might qualify under the FMLA. *See* 29 C.F.R. § 825.301(b-c) (1997). Upon receiving an employee's request for FMLA qualifying leave, the employer must notify the employee of his rights and duties under the FMLA. *See* 29 C.F.R. § 825.301(b-c). Violation of the FMLA notice requirements supports a cause of action for interference with an employee's attempt to exercise her rights under the FMLA. *See Mion v. Aftermarket Tool & Equipment Group*, 990 F. Supp. 535, 539 (W.D. Mich. 1997); *Fry v. First Fidelity Bancorporation*, 1996 U.S. Dist. LEXIS 875, No. 95-6019 (E.D. Pa. Jan. 30, 1996)(mem. op.). Mrs. Brungart never received notice of her rights under the FMLA for any of her leave requests that may have been covered by the FMLA. BST's position is that it does not have a responsibility to notify employees of their rights under the FMLA.[25] An

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[25] *See Record 18, Plaintiff's Evidentiary Submissions, Doc. 18 - Exhibit #4, Deposition Testimony of Priss Pittman*, p. 31. BST follows this policy in all cases. Wanda Cagle, a co-worker of Mrs. Brungart's, testified that when she sought medical leave, she was not informed of her rights under the FMLA. *See Record 18, Plaintiff's Evidentiary Submissions, Doc. 18 - Exhibit #22, Deposition Testimony of Wanda Cagle*, p. 16.

employee is not told whether their leave qualifies under the FMLA unless she expressly mentions the statute.[26] This practice violates the law by keeping employees ignorant of their rights and responsibilities under the FMLA. The ability to pursue a cause of action for notice violations of the FMLA is an important federal question to which this Court has not yet spoken.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[26] *See Record 18, Evidentiary Submissions, Doc. 18 - Exhibit #23, Deposition Testimony of Vicki Cappuzzo,* pp. 28-29.

CITATIONS FOR ORDERS AND OPINIONS ENTERED IN CASE

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[PUBLISH]

UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT

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No. 99-14472

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D.C. Docket No. 98-02558-CV-AR-S

ROBIN AMARO BRUNGART,

Plaintiff-Appellant,

versus

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Alabama

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**(October 24, 2000)**

Before CARNES, MARCUS and FARRIS*, Circuit Judges.

CARNES, Circuit Judge:

Robin Amaro Brungart appeals from the district court's grant of summary judgment in favor of BellSouth Telecommunications, Inc. ("BellSouth"), on her claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* Brungart argues she was wrongfully denied FMLA leave pursuant to 29 C.F.R. § 825.110(d) and also that BellSouth retaliated against her in violation

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* Honorable Jerome Farris, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

of the FMLA. This appeal primarily presents two issues: (1) whether that part of the notice provision of the § 825.110(d) regulation which purports to create eligibility based upon the failure of an employer to notify the employee of ineligibility within a specified time is a valid interpretation of the FMLA; and (2) whether termination of an employee the day before the commencement of scheduled FMLA leave always creates a genuine issue of material fact about the causal connection element for a prima facie case of discrimination. We answer both questions in the negative.

## I. BACKGROUND[1]

In February 1991 Robin Amaro Brungart began working for BellSouth in Florida as a service representative. On December 1, 1994 she began an unpaid leave of absence which lasted until September 1996. On September 23, 1996, Brungart was transferred to a service representative position for BellSouth in Birmingham, Alabama, and began a three week training program.

On December 2, 1996, Brungart's mother was hospitalized for emergency heart surgery. Brungart told her supervisors that she wanted to apply for FMLA leave effective immediately, and she submitted an FMLA leave application form, all on that same day.

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[1] The facts we set out are drawn from the evidence in the summary judgment record viewed in the light most favorable to the party against whom summary judgment was granted. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) (internal citations omitted).

Later that day, Brungart attempted to call one of her supervisors, Peggy Thompson, but was unable to reach her. Afterward, Thompson called Brungart who was at the hospital, and Brungart informed her that she would be off from work for the next ten days due to her mother's condition. Thompson told Brungart to keep in touch with the office every few days. Brungart did so, but on December 10, 1996, Thompson called Brungart and told her that she had been listed as a "no report" because she had not called in every day. Brungart responded that she had not been told to call in every day. The next day, Brungart called Thompson to let her know that she would not be at work due to her mother's condition. Brungart was written up for not calling in that day before her shift started. When Brungart eventually returned to work, she received a written reprimand for her absence.

By letter dated January 16, 1997, BellSouth denied Brungart's December 2, 1996 request for FMLA leave. The grounds BellSouth gave for the denial was that Brungart had not worked 1,250 hours in the past 12 months, which is the minimum number of hours the FMLA requires before an employee is entitled to statutorily protected leave.

As a service representative, Brungart's job was to answer calls from customers wishing to discuss service orders. To maintain customer service, BellSouth measures the amount of time service representatives are actually available to take calls compared with the amount of time they are scheduled to do so. Because it involves adhering to a schedule, this measurement is called the adherence percentage. Service representatives in Birmingham were

initially required to meet an adherence percentage of 93, but that percentage was increased in early 1997 to 94.5.

Brungart did not meet the required adherence percentage for October through December, the three full months that she worked at BellSouth in 1996. Because BellSouth has a grace period for employees coming out of training, Brungart was not disciplined in 1996 for failing to meet her adherence percentages. However, Brungart never met the required adherence percentage at any time before she was terminated in July of 1997. BellSouth's discipline process consists of progressive steps: counseling, warning, suspension, and finally termination of employment. Brungart received a warning and was suspended twice during 1997 because of her failure to meet adherence percentage requirements.

Some time in May or June of 1997, Brungart again applied for FMLA leave, this time so that she could have knee surgery. BellSouth's FMLA administrator approved three weeks of leave to begin July 10, 1997.

In early July, Calvin Nelson became the new top tier manager of the service representatives in Birmingham. He oversaw Vicky Capuzzo, who was Brungart's immediate supervisor. Also in early July, Capuzzo asked Brungart to resign, but Brungart refused. After the June adherence percentages were reported, Capuzzo told Nelson that Brungart had not met her required adherence objectives for June and also informed Nelson about Brungart's previous discipline (her warning and two suspensions during 1997) for failure to meet the adherence objectives.

Nelson made the decision to terminate Brungart. Nelson testified in his deposition that when he decided to terminate Brungart, he had no knowledge of her scheduled FMLA leave, and there is no evidence to contradict his testimony about that. Brungart was terminated on July 9, 1997, the day before she was to begin her requested leave for the knee surgery. She was told that she was being terminated for failure to meet BellSouth's adherence requirements.

Brungart sued BellSouth in a complaint which, after amendment, contained four counts. Count 1 claimed that BellSouth's termination of Brungart on July 9, 1997 had violated the FMLA, because it occurred as a result of her having requested leave to which she was entitled under the FMLA and which was scheduled to begin on July 10, 1997. Count 2 claimed that BellSouth had violated the FMLA by denying Brungart leave on an earlier occasion, leave she had requested in December of 1996. At that time, Brungart had not been employed the minimum number of hours necessary to make her eligible for FMLA leave, but she claimed to be entitled to it anyway, because BellSouth had failed to respond to her request for leave within two days. Count 3 claimed that BellSouth violated Brungart's rights under the FMLA by not giving her regular notice of her rights and responsibilities under the FMLA, and by not presenting her with written notice granting or denying her December 1996 leave request. Count 4 claimed that BellSouth had violated the Labor Management Relations Act in various ways.

Both parties filed motions for summary judgment. The district court granted BellSouth's motion for summary judgment on all counts. Brungart appeals only the

district court's grant of summary judgment to BellSouth on the three FMLA counts.

## II. DISCUSSION

We review the district court's grant of summary judgment *de novo*. *See Allison*, 184 F.3d at 1306. Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We begin with Count 2, because it concerns events that are first in time.

### A. WRONGFUL DENIAL OF LEAVE

In Count 2 of her complaint, Brungart claimed that BellSouth violated the FMLA with respect to the FMLA leave request she submitted on December 2, 1996 for her mother's emergency heart surgery. Congress enacted the FMLA "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1). The FMLA entitles eligible employees to take up to 12 weeks of leave during any 12-month period for medical reasons, for the birth or adoption of a child, and for the care of a spouse, child, or parent who has a serious health condition. *See* 29 U.S.C. § 2601(b)(2); 29 U.S.C. § 2612(a)(1). Not all employees are eligible for leave under the FMLA. The statute defines those who are as follows:

> The term "eligible employee" means an employee who has been employed –

> (i) for at least 12 months by the employer with respect to whom leave is requested . . . ; and
>
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A). It is undisputed that at the time of her leave request in December of 1996 Brungart had not worked 1,250 hours for BellSouth during the previous 12-month period.

Brungart's theory behind Count 2 is that BellSouth's failure to inform her of her eligibility for FMLA leave within the time required by 29 C.F.R. § 825.110(d) made her eligible for the leave, or at least should have prevented BellSouth from denying that she was eligible, and as a result its denial of leave was wrongful. Brungart did not give notice of her need for leave more than two business days prior to the date she wanted to commence the leave, but instead applied for leave to begin effective immediately. In those circumstances, the relevant portion of § 825.110(d) is the following:

> Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not

eligible within two business days of receiving the employee's notice.

*Id.*[2]

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[2] Section 825.110(d) provides in full:

> The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of the need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not

The validity of § 825.110(d) is squarely presented in this case. It is undisputed that in December 1996 when Brungart applied for medical leave to begin immediately she was statutorily ineligible for FMLA leave, because she had not worked for BellSouth the requisite 1,250 hours within the previous 12-month period. Likewise, it is undisputed that BellSouth failed to advise her of her ineligibility for FMLA leave until more than a month after it received her application for it. If the § 825.110(d) regulation is valid, by virtue of it Brungart is to be deemed eligible for FMLA leave in December 1996, but if the regulation is invalid there is no basis for her eligibility at that time. The district court held that BellSouth was entitled to summary judgment on this count because § 825.110(d) was "unconstitutional to the extent that it converts ineligible employees into eligible employees, contrary to the express language of the FMLA."

The only circuit to have addressed the issue so far is the Seventh, which held that this part of the § 825.110(d) regulation is invalid. *See Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000).[3] We could not agree

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> give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

[3] In addition to the district court in this case, four other district courts have addressed this issue, and all but one of them have reached the same conclusion. *See McQuain v. Ebner Furnaces, Inc.*, 55 F.Supp.2d 763 (N.D. Ohio 1999) (holding § 825.110(d) to be invalid); *Seaman v. Downtown Partnership of*

more. As the Seventh Circuit explained: "The statutory text is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months." *Id.* To put it in *Chevron* terms, "Congress has directly spoken to the precise question at issue," which is eligibility for the medical leave rights created in the statute, and because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984). Congress could have, but did not, confer the right to family medical leave on any employee who did not receive a prompt response from the employer to her leave request.

There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled. Instead, the Department of Labor in this regulation has attempted to pry apart the clear words of the act in order to create a gap into which it can wedge its policy preference. We understand the Department's motive, which is to further the goals of the act by forcing employers to respond to leave requests within a reasonable period of time. But when an administrative agency seeks to improve legislation by altering the basic coverage provisions that Congress has written into the law, it has gone

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*Baltimore, Inc.*, 991 F.Supp. 751 (D.Md. 1998) (same); *Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133 (E.D. Va. 1997) (same); *but see Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997) (holding § 825.110(d) to be valid).

too far. The rule of law in general, and separation of powers principles in particular, require that such administrative hubris be reigned in, and that the task of improving the basic provisions of statutes be left to the same body that wrote them in the first place.

We note that our conclusion here is strongly supported by our decision last year in *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999). In that case this Court invalidated another Department of Labor regulation, one which provided that if an employer failed to give prospective notice that an absence was being counted as FMLA leave, the leave taken could not be counted against the employee's 12-week entitlement under the FMLA, with the result that the employer would be required to give a total of more than 12 weeks of leave. *See id.* at 1307-08 (citing 29 C.F.R. § 825.208(c); 29 C.F.R. § 825.700(a)). We explained that the regulation "converts the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." *Id.* at 1308. Because the FMLA itself "does not suggest that the 12 week entitlement may be extended," we held that the regulation was contrary to the statute and therefore invalid and unenforceable. *Id.* That reasoning fits here.

For all of these reasons, we hold that 29 C.F.R. § 825.110(d) is invalid insofar as it purports to extend the

eligibility provisions of the FMLA to an otherwise ineligible employee who is not promptly notified after requesting leave that she is ineligible for it under the statute.[4] Because Brungart's sole theory of eligibility for FMLA leave involved in Count 2 (the December 1996 request) fails, the district court did not err in granting summary judgment against her on that count.

## B. RETALIATORY DISCHARGE

Although she was not eligible for FMLA leave in December 1996, which is the time involved in Count 2 of

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[4] In dicta the Seventh Circuit has speculated about the possibility of an employer being estopped from denying an employee's eligibility for FMLA leave if the employee reasonably relied to her detriment on the employer's failure to notify her promptly of her ineligibility. *See Dormeyer*, 223 F.3d at 582. We do not have those facts before us, because Brungart did not reasonably rely to her detriment upon BellSouth's failure to respond more promptly to her leave request. It is true that Brungart was written up for taking unauthorized leave, but she left work immediately and there is no evidence she would not have taken any leave to be with her mother if she had been informed right away by BellSouth that she was not entitled to it. While the evidence viewed in the light most favorable to Brungart indicates that she might not have been gone as long had she been informed earlier that she was not eligible for FMLA leave, she conceded in deposition that she would have taken some leave anyway. And there is no evidence Brungart would not have been written up just the same if she had returned earlier. We decline to speculate about what the result might be if there had been facts to support a detrimental reliance argument. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1314-15 (11th Cir. 1998) (Carnes, J., concurring) (noting that dicta can be useful, but explaining why views expressed in dicta are less reliable than those embodied in holdings).

the complaint, Brungart had worked sufficient hours to become eligible before July of 1997, which is the time involved in Count 1 of the complaint. In that count Brungart claimed that BellSouth violated the FMLA by terminating her after her July 1997 application for FMLA leave, and in interference with that exercise of her rights under the statute. In her brief, Brungart characterizes this as a retaliation claim.[5]

In addition to providing specified employees the right to certain leave, the FMLA also protects employees from being discriminated against by their employers for exercising or attempting to exercise the rights it provides. The statute makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter [of the FMLA]." 29 U.S.C. § 2615(a)(1). The statute also makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter [of the FMLA]." 29 U.S.C. § 2615(a)(2). Additionally, "[a]n employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave." 29 C.F.R. § 825.220(c).

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[5] The statute itself uses the language of interference, restraint, denial, discharge, and discrimination, not retaliation. But nomenclature counts less than substance. And the substance of the FMLA provisions as they concern this case is that an employer may not do bad things to an employee who has exercised or attempted to exercise any rights under the statute. Asking for medical leave is exercising or attempting to exercise a right under the statute, and being fired is a bad thing.

When evaluating a claim of retaliation under the FMLA, in the absence of direct evidence of discrimination on the part of the employer, we apply the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), for evaluating Title VII retaliatory discharge claims. *See Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1283 (11th Cir. 1999); *see also King v. Preferred Technical Group*, 166 F.3d 887, 891-92 (7th Cir. 1999) ("We find no reason to treat an intent-based FMLA claim . . . any differently than other retaliatory discharge cases."); *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 319 (5th Cir. 1999) (applying the *McDonnell Douglas* framework to evaluate claims that an employee was penalized for exercising rights protected by the FMLA in the absence of direct evidence of discrimination); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998) (same); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (same).

In order to establish a prima facie case of retaliatory discharge or retaliation using the *McDonnell Douglas* framework, a plaintiff must show that (1) she engaged in statutorily protected conduct; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected conduct and the adverse employment action. *See Parris v. Miami Herald Pub'g Co.*, 216 F.3d 1298, 1301 (11th Cir. 2000); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000) (Title VII); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir. 1999) (ADA).

BellSouth does not dispute that Brungart has satisfied the first two elements of the prima facie case.

Brungart did engage in protected conduct by applying for FMLA leave for knee surgery, and she also suffered the adverse employment action of being discharged. The dispute is about whether Brungart came forth with sufficient evidence to create a genuine issue of fact that her application for FMLA leave caused the termination of her employment with BellSouth, which means: could a jury reasonably find from the evidence presented at the summary judgment stage that Brungart was fired because she sought FMLA leave? The district court granted summary judgment to BellSouth because it concluded that Brungart failed to create a genuine issue of fact about causation, that no reasonable jury could find a causal link between her request for leave and her termination.

Brungart argues that the fact she was fired the day before she was scheduled to begin her medical leave on July 10, 1997 is sufficient to create a genuine issue of material fact about causal connection, the third element of the prima facie case. To establish the causal connection element, "a plaintiff need only show 'that the protected activity and the adverse action were not wholly unrelated.' " *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1354 (11th Cir. 1999) (quoting *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985)). In order to show the two things were not entirely unrelated, the plaintiff must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997) ("[I]n a case involving a corporate defendant the plaintiff must show that the corporate agent who took the

adverse action was aware of the plaintiff's protected expression. . . . "). That requirement rests upon common sense. A decision maker cannot have been motivated to retaliate by something unknown to him. As with most facts, the defendant's awareness can be established by circumstantial evidence. *See Goldsmith*, 996 F.2d at 1163.

The general rule is that close temporal proximity between the employee's protected conduct and the adverse employment action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection. *See Gupta*, 212 F.3d at 590; *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995) ("Proximity in time is sufficient to raise an inference of causation.") However, there is this exception: temporal proximity alone is insufficient to create a genuine issue of fact as to causal connection where there is unrebutted evidence that the decision maker did not have knowledge that the employee engaged in protected conduct. *See Clover*, 176 F.3d at 1355-56. In *Clover* the plaintiff, who brought a Title VII retaliation claim, had been informed the day after she engaged in protected conduct that she was going to be terminated, and later she was terminated. *Id.* at 1349. Notwithstanding the close temporal proximity between the protected conduct and the initial decision to terminate the plaintiff, we reversed the district court's denial of the defendant's motion for judgment as a matter of law on the retaliation claim. *See id.* at 1355-56. We did so because the plaintiff "failed to present sufficient evidence to establish that [the decision maker] was aware of her protected conduct." *Id.* at 1356. Exactly the same situation is before us in this case, and the *Clover*

decision compels the same result.[6] *See generally Hudson v. Southern Ductile Casting Corp.*, 849 F.2d 1372, 1376 (11th Cir. 1988) (affirming grant of summary judgment to the defendant on retaliatory discharge claim where there was uncontradicted evidence that the decision makers were unaware of the plaintiff's threat to file an EEOC charge); *McCollum v. Bolger*, 794 F.2d 602, 610-11 (11th Cir. 1986) (affirming judgment for defendant and holding that the plaintiff failed to prove a prima facie case of retaliation where evidence at trial showed that the decision maker did not know that the plaintiff was engaging in protected conduct).

Brungart contends that although Title VII cases often require actual knowledge on the part of the decision maker, under the FMLA, temporal proximity alone is sufficient because it implies knowledge. To say that temporal proximity "implies" knowledge is simply to say that we should assume such knowledge even though there is no evidence other than temporal proximity to cast any doubt on the decision maker's denial of knowledge. Or more accurately, at the summary judgment stage, "implying" knowledge from temporal proximity despite the unrefuted testimony of the decision maker that he knew nothing of the protected conduct means that we

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[6] *Clover* did involve judgment as a matter of law, while the present case involves summary judgment. However, as the Supreme Court and this Court have explained, "the standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same." *Chapman v. AI Transport*, 229 ___ F.3d ___, n.11 (11th Cir. 2000) (en banc) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, ___ U.S. ___ 120 S.Ct. 2097, 2110 (2000)).

should allow a factfinder to decide, without any basis other than temporal proximity, that the decision maker is lying.[7] But there is no good reason why we should do that in FMLA cases but not in Title VII cases, and we know from our *Clover* decision that we do not do that in Title VII cases.

Brungart also argues that even if the decision maker did not have knowledge of the protected conduct, knowledge should be "imputed" to the corporation where other corporate officials or supervisors had knowledge of it. That position is, of course, foreclosed by our *Clover* decision, because the defendant in that case was a corporation. Even if the *Clover* decision did not exist, we would not be persuaded to adopt Brungart's imputed knowledge theory. The BellSouth corporation itself did not actually make the decision to take the adverse employment action; Nelson made that decision, albeit on the corporation's behalf. Because Nelson did not know of the protected conduct, he could not have taken that action on the corporation's behalf because of the protected conduct. This is another way of saying that the fact the employer is a corporation does not relieve a plaintiff of the burden of showing a causal connection between the protected conduct and the decision to take the adverse employment action.

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[7] Brungart argues that Nelson's knowledge of her request for medical leave should be inferred because he was her direct supervisor. Whether that factual premise would make any difference is not something we need to decide, because the record reveals without evidentiary dispute that Nelson was not Brungart's direct supervisor, but instead was the supervisor of her supervisor.

Because the evidence is unrefuted that Nelson, the decision maker, did not know Brungart had requested and been scheduled for medical leave, Brungart failed to create a genuine issue of fact as to a causal connection between her termination and her scheduled leave or her request for it. Accordingly, she failed to establish a prima facie case of retaliation under the FMLA, and the district court correctly granted summary judgment to BellSouth on this claim.[8]

## III. CONCLUSION

The district court's judgment is **AFFIRMED**.

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[8] In addition to contesting the district court's grant of summary judgment in favor of BellSouth on Counts 1 and 2, which we have fully discussed, Brungart also contends the district court erred in granting summary judgment in favor of BellSouth on Count 3. In that count, Brungart alleged that BellSouth failed to give her "regular notice of her rights and responsibilities under the FMLA" and "written notice either expressly denying or granting her leave under the FMLA prior to her taking leave in December, 1996 for her mother's heart surgery." Having considered her arguments against the factual circumstances of this case, we affirm the district court's grant of summary judgment on this issue without further discussion.

**United States Court of Appeals**

For the Eleventh Circuit

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No. 99-14472

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District Court Docket No.
98-02558-CV-AR-S

ROBIN AMARO BRUNGART,

Plaintiff-Appellant,

versus

BELLSOUTH BUSINESS SYSTEMS, INC.,

Defendant,

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Alabama

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JUDGMENT

(Filed Oct. 24, 2000)

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: October 24, 2000

For the Court: Thomas K. Kahn, Clerk

By: McCombs, Elaine

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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|---|---|---|
| ROBIN AMARO BRUNGART, Plaintiff | ) | CIVIL ACTION NO. 98-AR-2558-S |
| vs. | ) | |
| BELLSOUTH TELECOMMUNICATIONS, INC., Defendant. | ) | |

**ORDER**

(Filed Sept. 15, 1999)

For the reasons set out more fully in the memorandum opinion accompanying this order, the court **EXPRESSLY DETERMINES** that no genuine issue of material fact exists with respect to any and all of plaintiff's claims and that defendant is entitled to judgment as a matter of law. Accordingly, it is **ORDERED, ADJUDGED,** and **DECREED** that defendant's motion for summary judgment is hereby **GRANTED,** and the action is **DISMISSED WITH PREJUDICE.**

Costs are taxed against plaintiff.

DONE this 15th day of September, 1999.

/s/ William M. Acker, Jr.
William M. Acker, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| ROBIN AMARO BRUNGART, Plaintiff | ) | CIVIL ACTION NO. 98-AR-2558-S |
| vs. | ) | |
| BELLSOUTH TELECOMMUNICATIONS, INC., Defendant. | ) | |

## MEMORANDUM OPINION

(Filed Sept. 15, 1999)

Presently before the court are cross-motions for summary judgment. Each side seeks judgment as a matter of law on all four counts of the complaint. In other words, both parties are saying that the case can be decided on undisputed facts. Counts one, two, and three are claims under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601 et seq. Count four is a claim under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. For the reasons set forth below, defendant's motion is due to be granted on all counts while plaintiff's motion is due to be denied.

### Pertinent and Undisputed Facts

Plaintiff, Robin Amaro Brungart ("Mrs. Brungart"), began her employment with defendant, BellSouth Telecommunications, Inc. ("BellSouth"), on February 11, 1991,

in Florida. In December of 1994, she went on a leave of absence pending transfer. She was transferred to BellSouth's Birmingham location and began work there on September 23, 1996. Her employment was covered by a collective bargaining agreement between BellSouth and her union, the Communication Workers of America.

When Mrs. Brungart resumed working for BellSouth in Birmingham, her supervisor was Judy Cardin. In November of 1996, Peggy Thompson became her acting supervisor. On December 2, 1996, Mrs. Brungart's mother went into the hospital for emergency surgery. As a result, Mrs. Brungart told Ms. Thompson that she wanted to take FMLA leave immediately. Ms. Thompson and Ms. Cardin gave Mrs. Brungart the telephone number of the FMLA administrator. Mrs. Brungart called the FMLA administrator, who faxed Mrs. Brungart an application which she filled out and submitted that day.

Later that same day, Mrs. Brungart called Ms. Thompson to let her know of her mother's status, but was unable to reach Ms. Thompson. When Ms. Thompson returned the call, Mrs. Brungart told her that she would be off from work for the next week to ten days because of her mother's condition. Ms. Thompson told Mrs. Brungart to keep in touch every few days to let the office know how her mother was doing.

Acting upon Ms. Thompson's request, Mrs. Brungart periodically reported in. On December 10, 1996, Ms. Thompson called Mrs. Brungart and told her that she had been listed as a "no report" for failure to call in every day. Mrs. Brungart responded that Ms. Thompson had not told her to call in every day.

When Mrs. Brungart returned to work sometime around December 16, 1996, she was given a written reprimand for her absences. On January 16, 1997, the plaintiff received notice from the FMLA administrator that her December 2, 1996, request for FMLA leave had been denied because she did not meet the eligibility requirement as established by the FMLA, NAMELY, that she had not worked 1,250 hours or more in the twelve months preceding her request for FMLA leave.

In February of 1997, Mrs. Brungart received a counseling entry from Judy Cardin for an alleged failure to follow instructions related to scheduled adherence. (Def.'s Ex. 8, Depo. of Pl.) Adherence is a percentage determined by the amount of time a service representative is a *actually* available to take calls divided by the amount of time she is *supposed* to be available to take calls. BellSouth's records indicate that Mrs. Brungart failed to meet her required adherence percentage for the month of January. At that time, the adherence percentage required of customer service representatives was 94.5%.

In March of 1997, Vicky Capuzzo became Mrs. Brungart's supervisor. On April 14, 1997, Ms. Capuzzo issued a warning regarding Mrs. Brungart's alleged failure to follow instructions relating to scheduled adherence and advising her that she needed to improve her adherence level. (Def.'s Ex. 11, Depo. of Pl.) According to BellSouth's adherence reports, Mrs. Brungart's adherence for the February and March preceding this warning had been below the required adherence percentage.

BellSouth's records indicate that Mrs. Brungart was below the adherence percentage for April as well. As a

result, in May of 1997, Ms. Capuzzo suspended Mrs. Brungart for three days. The personnel record dated May 8, 1997, regarding that suspension states that Mrs. Brungart was being suspended for failure to follow instructions relating to scheduled adherence. (Def.'s Ex. 14, Depo. of Pl.) The report also states that Mrs. Brungart was advised that unless she improved her adherence, further disciplinary action would be taken up to and including discharge. *Id.*

BellSouth's records indicate that Mrs. Brungart did not meet her scheduled adherence for May of 1997. On June 18, 1997, Mrs. Brungart was suspended for five days for failure to follow instructions relating to scheduled adherence. Ms. Capuzzo's report states that Mrs. Brungart was advised that unless she improved her adherence to a satisfactory level, further disciplinary action would be taken, including discharge. (Def.'s Ex. 17, Depo. of Pl.)

From February 1997 through July 1997, Mrs. Brungart filed several grievances through her union. Four of those grievances challenged, among other things, the legitimacy of the discipline she had received for failing to meet her adherence percentages. Specifically, Mrs. Brungart challenged the *accuracy* of her adherence readings because she believed the following:

(1) Her Rockwell recording unit was defective; (2) Ms. Capuzzo tampered with her Rockwell recording unit when she was away from her desk; and 3) Her supervisors would not make corrections to erroneous adherence entries. (*See* Def.'s Exs. 13, 17, 20, and 21, Depo. of Pl.)

At some time in May or June of 1997, Mrs. Brungart applied for FMLA leave for the purpose of personal knee surgery. The FMLA administrator approved the leave, which was to begin in mid-July.

In early July 1997, Priss Pittman, Ms. Capuzzo's manager, moved to a new job. Calvin Nelson took Ms. Pittman's place and became manager over the Service Rep organization. After receiving the June adherence results. Ms. Capuzzo called Mr. Nelson and informed him that Mrs. Bumgart had not met her adherence objective for June. Mr. Nelson then asked Ms. Capuzzo what, if any, previous disciplinary actions had been brought against Mrs. Brungart for failure to meet adherence. Ms. Capuzzo informed him that Mrs. Brungart had received counseling, warning, and two suspensions. (Nelson Aff. ¶ 6.)

After receiving this information, Mr. Nelson decided to terminate Mrs. Brungart. Mrs. Brungart was in fact terminated on July 9, 1997, one day before her scheduled leave for knee surgery was to begin. Mrs. Brungart was told that she was being terminated for adherence reasons. However, Mr. Nelson did not know at the time that he fired Mrs. Brungart that she was scheduled to take FMLA leave the next day, nor did he know that she had filed any grievances with her union regarding her adherence percentages. (*See* Depo. of Nelson, pp. 12-13; 24-25.)

When Mrs. Brungart filed this suit, her grievances against BellSouth were still pending.

**Summary Judgment Standard**

Rule 56(c), F.R.Civ.P. provides that summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has emphasized that this language means exactly what it says: there must be a *genuine* issue of material fact, not merely some factual dispute. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2510 (emphasis added). What this standard means in practice is that "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968)). Because both parties in this case have filed motions for summary judgment, this court must look at the evidence offered by both parties and determine whether a jury could return a verdict for either party based on that evidence. If this court determines that a jury could find for either party, both motions for summary judgment must be denied. If, on the other hand, this court finds as a matter of law that a jury could return a verdict for only one party, that party's motion for summary judgment must be granted and the other denied.

## COUNT 1: FMLA RETALIATION

### Applicable Law

In Title VII cases, the *McDonnell Douglas* burden shifting framework applies to claims based on indirect evidence. This court has already determined that the *McDonnell Douglas* burden shifting framework applies to FMLA retaliation claims, so the court will apply that framework here to Ms. Brungart's claim. *See Maxwell v. American Red Cross Blood Services,* No. 95-AR-2625-S, 1996 WL 437456 (N.D. Ala. Feb. 27, 1996). *See also Morgan v. Hilti,* 108 F.3d 1319 (10th Cir. 1997) and *Munizza v. State Farm Mutual Automobile Ins. Co.,* No. 95-35794, 1996 WL 711563 (9th Cir. Dec. 5, 1996) (applying *McDonnell Douglas* to FMLA cases).

### Prima Facie Case

In order to establish a prima facie case of retaliation under the FMLA, a plaintiff must show: (1) She exercised rights protected by the FMLA; (2) She suffered an adverse employment actionl; and (3) There is a causal link between these two elements. *See Fleming v. Boeing Co.,* 120 F.3d 242, 248 (11th Cir. 1997) (setting out prima facie case for retaliation under Title VII).

Here, the first element is met because Mrs. Brungart was attempting to exercise her right to take an approved FMLA leave for surgery. She also satisfies the second element because she was terminated. Thus, Mrs. Brungart's prima facie case hinges on whether she can demonstrate that the exercise of her FMLA rights *caused* the adverse employment decision.

According to the Eleventh circuit, temporal proximity between an exercise of a protected right and an adverse employment action is, in and of itself, sufficient to raise a initial inference of causation. In other words, "Where termination closely follows protected activity, it is usually reasonable to infer that the activity was the cause of the adverse employment decision." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 745 (11th Cir. 1996) (citing *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995)). In this case, Mrs. Brungart can demonstrate temporal proximity because the undisputed facts show that she was scheduled for FMLA leave on July 10, 1997, and that she was terminated on July 9, 1997.

However, this showing is not dispositive because the initial inference of causation established by temporal proximity logically can be rebutted if the decision-maker is *unaware* of the protected activity. This is so because inherent in the claim of retaliation is the concept that one cannot retaliate against something that one has no knowledge of. The Eleventh Circuit is in accord with this reasoning. *See, e.g., Hudson v. Southern Ductile Casting Corp.*, 849 F.2d 1372, 1376 (11th Cir. 1988), (holding that the plaintiff could not prove retaliation where the uncontradicted evidence showed that the decision-makers were unaware of the plaintiff's threat to file an EEOC charge); *McCollum v. Bolger*, 794 F.2d 602, 610-611 (11th Cir. 1986) (holding that the plaintiff failed to prove a prima facie case of retaliation where the decision-maker had no knowledge of the plaintiff's engaging in protected activity). *See also Burger v. Daytona Beach*, 72 Fair Empl.Prac.Cas. (BNA) 584, 1996 WL 673144, *9 (M.D. Fla. 1996) (citing *McCollum* and holding, as a matter of law,

that the plaintiff could not prove retaliation where the decision-maker did not know of the plaintiff's participation in Title VII proceedings).

Thus, even if the adverse decision is close in time to the protected activity, the fact that the decision-maker had no knowledge of the protected activity logically precludes the inference that the protected activity *caused* the termination. This is exactly the case here. Ms. Brungart was scheduled to take her leave July 10th. She was terminated only one day before, on July 9th. These facts do raise an initial inference of causation. However, the undisputed evidence shows that Mr. Nelson was not aware that Ms. Brungart was scheduled to take FMLA leave. (Nelson Depo., pp. 12, 13.) Thus, in the absence of any evidence to the contrary, this fact effectively rebuts the inference of causation established merely by temporal proximity. Therefore, Mrs. Brungart cannot prove her retaliation claim as a matter of law.

The court feels compelled to clear up a major issue of confusion, namely, Mrs. Brungart's adherence ratings. Both sides have introduced a substantial amount of testimony and documentary evidence regarding Mrs. Brungart's adherence ratings. The court surmises that this evidence was introduced in anticipation of the second and third steps in the *McDonnell Douglas* framework; BellSouth has offered Mrs. Brungart's adherence ratings as its legitimate, non-discriminatory reason for her termination, and Mrs. Brungart has attempted to show that this reason is a pretext by offering evidence that her adherence ratings are inaccurate.

While Mrs. Brungart may have a legitimate complaint about the accuracy of her adherence reports, the debate over accuracy misses the point. Whether the reports are accurate or whether Ms. Brungart's immediate supervisors incorrectly recorded her time is irrelevant when Mrs. Brungart cannot show that Mr. Nelson knew of her impending FMLA leave. This conclusion is true whether Mrs. Brungart is attempting to establish a prima facie case at stage one of *McDonnell Douglas* or whether she is attempting to demonstrate pretext at stage three.

Put another way, while Mrs. Brungart might be able to show that she was treated "unfairly" in the general sense of that word, such a showing would be insufficient to establish a claim of retaliation under the FMLA. To prove a claim of retaliation, Mrs. Brungart must show that she was fired *because* of her impending FMLA leave.

Because Mr. Nelson was the decision-maker, and because Mrs. Brungart has offered no evidence to suggest that he knew of her scheduled FMLA leave, she cannot, as a matter of law, prove retaliation. Mrs. Brungart's motion for summary judgment as to Count One is therefore due to be DENIED, while BellSouth's motion for summary judgment is due to be GRANTED.

## COUNT 2: WRONGFUL DENIAL OF FMLA LEAVE

The FMLA itself does not speak to how or when an employer must notify an employee of her eligibility or ineligibility for FMLA leave. Rather, Congress delegated that task to the Secretary of Labor. The only direction the

Secretary of Labor received from Congress was to "prescribe such regulations as are necessary to carry out" the FMLA. 29 U.S.C. § 2654.

Acting upon this open-ended directive, the Secretary of Labor promulgated 29 C.F.R. § 825.110(d). That regulation states that if an employee notifies her employer of the need for FMLA leave less than two business days prior to the commencement of the leave, ("emergency" leave), that "employee will be deemed eligible if the employer fails to advise the employee that [she] is not eligible within two business days of receiving [her] notice." In other words, if the employer doesn't tell the employee whether she is eligible within two days of her "emergency" request, the employer will be estopped from denying that employee's eligibility.

Based on this regulation, Mrs. Brungart claims that BellSouth wrongfully denied her December 2, 1996, request for FMLA leave because it did not notify her within two days of her request that she was ineligible. At first blush, it appears that she is correct because the undisputed facts show that BellSouth facially violated § 825.110(d); Mrs. Brungart did not receive notice of her ineligibility until January 16, 1997, more than a month after her initial request.

BellSouth argues that § 825.110(d) is an unconstitutional exercise of the Secretary of Labor's authority to interpret the FMLA and to enact regulations according to that interpretation. Mrs. Brungart responds with the contention that under the standard articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778 (1984), this court

should defer to the Secretary's wisdom. Thus, the court must determine whether 29 C.F.R. § 825.110(d) is Constitutional, not whether it is wise. This is a novel constitutional question in this court and a difficult one. Striking down an administrative regulation is no ordinary occurrence. However, for the reasons stated below, this court joins with five other district courts which have considered this very issue and have held § 825.110(d) to be unconstitutional to the extent that it converts ineligible employees into eligible employees, contrary to the express language of the FMLA.

The Chevron Standard

Congress in its unquestioned wisdom has determined that under some circumstances, agencies are better suited to make policy decisions than the courts, and, in some cases, than Congress itself. Thus, the Supreme Court has long deferred to the wisdom of administrative agencies in interpreting Congressional statutes. In *Chevron*, the Court set forth the standard for lower courts to apply in determining whether an administrative agency has exceeded its scope of Constitutional authority. First, a court must ask whether Congressional intent is clear regarding the particular issue at hand. If so, that intent controls and any administrative regulations to the contrary are invalid. However, if Congress has not spoken directly to the issue, the court must then ask whether the agency's construction of the statute is permissible. Although deference is not absolute, the agency's regulation will be struck down at this stage only if it is arbitrary, capricious, or manifestly incompatible with the statutory language.

Application of the Chevron Standard

In applying the first part of *Chevron* to this case, it is clear that Congress in the FMLA spoke directly to the issue of eligibility. In order to be eligible for FMLA leave, an employee must have worked for at least 1,250 hours in the twelve months preceding the requested leave 29 U.S.C. § 2611 (2) (A) (ii). This is an objective, unequivocal requirement. However, 29 C.F.R. § 825.110(d) states that if an employer does not notify the employee of his or her eligibility within two business days of the employee's "emergency" request, the employer is thereby estopped from denying that employee's eligibility. According to the purported regulation, an employer's inaction effectively converts an otherwise ineligible employee into an eligible one.

As the Eastern District of Virginia pointed out in striking down this regulation:

> Under a literal application of the regulation, an employee could work for one day, then inform her employer that she is sick and is leaving. If the employer fails to tell the employee she is ineligible for FMLA leave, the regulation at issue would ostensibly "deem her eligible," even though she has worked merely for one day.

*Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133, 1137 (E.D. Va. 1997). This court agrees with the *Wolke* court that such a bizarre result is contrary to express congressional intent. The Secretary of Labor is either a thaumaturgist or a poor reader.

All but one of the other district courts who have considered this question have struck down the regulation on the same basis. *See McQuain v. Ebner Furnaces, Inc.*, 1999 WL 528578, – F.Supp.2d – (N.D. Ohio 1999); *Dormeyer v. Comerica Bank – Illinois*, No. 96 C 4805, 1998 WL 729591 (N.D. Ill. Oct. 14, 1998); *Fisher v. State Farm Mutual Automobile Ins. Co.*, 999 F.Supp. 866 (E.D. Tex. 1998); *Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F.Supp. 751 (D. Md. 1998). *But see Miller v. Defiance Metal Products, Inc.*, 989 F.Supp. 945 (N.D. Ohio 1997).[1]

Because the regulation directly contradicts the explicit Congressional eligibility requirements, this court holds that 29 C.F.R. § 825.110(d) is unconstitutional insofar as it purports to convert "ineligible" employees into "eligible" ones. As a result, Mrs. Brungart has no claim that BellSouth wrongfully denied her requested FMLA leave in December of 1996 and thus, BellSouth's motion for summary judgment

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[1] Although the Eleventh Circuit has not directly confronted the constitutionality of § 825.110(d), this court's decision of today is in accord with the Eleventh Circuit's reasoning in *McGregor v. Autozone, Inc.*, 180 F.3d 1305, (11th Cir. 1999). In that case, the Eleventh Circuit considered the validity of 29 C.F.R. § 825.208. That regulation requires an employer to notify an employee that an absence is being counted as FMLA leave before the employer can count the leave against the twelve week entitlement of the FMLA. The Eleventh Circuit found that this regulation was invalid because it converted the statute's maximum requirement of twelve weeks unpaid leave "into an entitlement of an additional twelve weeks of leave unless the employer specifically and prospectively notifie[d] the employee that she [wa]s using her FMLA leave." *Id.* at 1308. Thus, the Eleventh Circuit struck down the regulation because it was directly contrary to the express intent of Congress under the FMLA.

as to Count Two is due to be GRANTED while Mrs. Brungart's motion is due to be DENIED.

## COUNT 3: FAILURE TO PROVIDE NOTICE UNDER THE FMLA

In her complaint, Mrs. Brungart alleges that BellSouth violated the notice provisions of the FMLA. She does not cite to any specific notice provisions in her complaint. Rather, she makes the following allegations: (1) "During her tenure with the defendant, the plaintiff did not receive regular notice of her rights and responsibilities under the FMLA." (Pl.'s Compl., ¶ 69); (2) "The plaintiff was never presented with written notice either expressly denying or granting her leave under the FMLA prior to her taking leave in December, 1996 for her mother's heart surgery." (Pl.'s Compl., ¶ 70); and, (3) "In light of the defendant's failure to inform the plaintiff of her rights, the defendant failed to fulfill its obligations as required under the Family and Medical Leave Act." (Pl.'s Compl., ¶ 71).

After reading Mrs. Brungart's briefs, it is not clear to the court exactly what notice provision she claims BellSouth to have violated.[2] Mrs. Brungart's memorandum in support of her motion for summary judgment cites 29 C.F.R. § 825.301(b) and (c) in support of her

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[2] BellSouth seems to think that Mrs. Brungart is alleging a violation of the notice posting requirement found in 29 C.F.R. § 825.300. The court does not find such an allegation in plaintiff's pleadings and papers. However, even if defendant is correct, this court would dismiss for lack of subject matter jurisdiction because it assumes without deciding that the Secretary of Labor alone has standing to bring a cause of action for a violation of 29 U.S.C. § 2619(a) and (b).

position that she was entitled to "written notice of her rights and duties under the FMLA when she expresse[d] a need for leave under the FMLA." However, this court does not find such an all-encompassing notice requirement in its reading of those regulations.

For example, § 825.301(b) states that an employer is required to provide written notice of several *specific* expectations and obligations of the employee such as: (1) whether the leave will be counted against the employee's annual FMLA leave entitlement; (2) any requirements for the employee to furnish medical certification of a serious health condition and the consequences for failing to do so; (3) the employee's right to substitute unpaid leave and whether the employer will require that substitution; (4) information regarding health insurance premiums and health benefits; (5) whether the employee must present a fitness for duty certificate; (6) the employee's status as a "key employee"; (7) the employee's right to restoration to the same or an equivalent job; and (8) the employee's potential liability for health insurance premiums paid by the employer during her leave if the employee doesn't return to work.

Section 825.301(c) states that the written notice required by paragraph (b) "must be provided to an employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave."

While subsection (b) provides a rather long list of specific notices that the employer must provide, neither (b) nor (c) requires that an employer give an employee "regular notice of her rights and responsibilities under

the FMLA," which plaintiff complains of not receiving in ¶ 69 of her complaint. Likewise, these sections do not require that employers give employees notice of whether a FMLA request is denied or granted as plaintiff refers to in ¶ 70 of her complaint.[3]

Thus, these sections are not relevant to Mrs. Brungart's allegations in her complaint. Furthermore, even if Mrs. Brungart were alleging that BellSouth violated the specific notice provisions in subsections (b) and (c), there would be no liability unless she could show that the violation constituted an "interference with, restraining of, or denial of an exercise or attempted exercise of [her] FMLA rights." *Minor v. Alacare Home Health Services, Inc.*, No. 98-AR-0477-M (N.D. Ala. 1998) (unpublished opinion). As a matter of law, plaintiff could not make that showing here because any failure to provide the notices required by subsections (b) and (c) *logically* could not have caused interference with, restraint of, or denial of her FMLA rights *because she was not eligible for FMLA leave* at the time she is alleging that she did not receive notice. In other words, even if BellSouth had provided her with every possible notice under the FMLA, it would not have changed the fact that she was ineligible for FMLA leave. Likewise, even if Mrs. Brungart were alleging that BellSouth violated some other notice provision such as § 825.301(a), the same reasoning would preclude any finding of liability.

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[3] To the extent that this portion of Mrs. Brungart's complaint refers to BellSouth's failure to notify her whether she was eligible or ineligible in December of 1996, this issue is addressed by the court's discussion of Count Two.

Thus, BellSouth's motion for summary judgment as to Count Three is due to be GRANTED and Mrs. Brungart's motion is due to be DENIED.

## COUNT 4: RETALIATION UNDER § 301 OF THE LMRA

In Count Four, Mrs. Brungart alleges that BellSouth breached the collective bargaining agreement in which BellSouth agreed "not to discriminate against, interfere with, restrain or coerce employees because of membership or lawful activity in the Union." She claims that BellSouth violated this provision when it harassed her and, eventually, when it terminated her allegedly for her union activity. Based on the numerous references to her union grievances in Mrs. Brungart's briefs, the court assumes that the filing of those grievances is the union "activity" to which Mrs. Brungart is referring.

The union itself is in the process of handling Mrs. Brungart's grievances, including those grievances regarding BellSouth's alleged breach of the collective bargaining agreement which appear to form the basis of Count Four as referred to above. (*See* Pl.'s Compl., ¶ 96.) The fact that the union is pursuing Mrs. Brungart's claim that BellSouth breached the collective bargaining agreement precludes this court from hearing Mrs. Brungart's § 301 claim. This is because an employee is required to exhaust her contractual remedies before she may bring a claim under § 301 of the LMRA. As the Supreme Court has explained, "[I]f the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend

on the ground that the exclusive remedies provided by such a contract have not been exhausted." *Vaca v. Sipes*, 386 U.S. 171, 184, 87 S.Ct. 903, 914 (1967).

The Supreme Court noted that there are exceptions to this exhaustion requirement: (1) If the employer has repudiated the contractual remedies or (2) If the union has breached its duty of fair representation in pursuing the claims for the employee. However, neither of these exceptions applies here. Mrs. Brungart has not alleged, and there is no evidence to suggest, that BellSouth has repudiated the remedies in the contract. Furthermore, there is no evidence or allegation that the union has breached its duty of fair representation. In fact, Mrs. Brungart has admitted exactly the opposite in her deposition. For example, she stated that the union has been handling her grievances adequately, that the union has been fair to her, and that to her knowledge, there are no facts to indicate the Union has acted arbitrarily, discriminatorily, or in bad faith with regard to her claims (Depo. of Pl. at 278)

Therefore, because neither of the exceptions to the exhaustion requirement applies, this court must dismiss Mrs. Brungart's § 301 claim for lack of subject matter jurisdiction. As a result, BellSouth's motion for summary judgment as to Count Four is due to be GRANTED and Mrs. Brungart's motion is due to be DENIED.

## CONCLUSION

A separate appropriate order will be entered.

DONE this 15th day of September, 1999.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 99-14472-DD

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ROBIN AMARO BRUNGART,

Plaintiff-Appellant,

versus

BELLSOUTH BUSINESS SYSTEMS, INC,

Defendant,

BELLSOUTH TELECOMMUNICATION, INC.,

Defendant-Appellee.,

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On Appeal from the United States District Court
for the Northern District of Alabama

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(FILED JAN. 03, 2001)

BEFORE: CARNES, MARCUS and FARRIS*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant Robin Amaro Brungart is DENIED.

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* Honorable Jerome Farris, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ Ed. E. Carnes
UNITED STATES CIRCUIT JUDGE

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